

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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CELSO LEON,

NO. CIV. S-04-2631 FCD JFM (HC)

Petitioner,

v.

MEMORANDUM AND ORDER

A. P. KANE, Warden,

## Respondents.

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18        This matter is before the court on respondent A.P. Kane's  
19 ("respondent") application for a stay of the court's February 8,  
20 2010 order granting petitioner Celso Leon's ("petitioner") habeas  
21 petition. The court adopted the magistrate judge's findings and  
22 recommendations ("F&Rs"), granting the petition on the ground  
23 that the record lacked some evidence supporting the denial of  
24 parole and requiring respondent to "forthwith set a parole  
25 release date for petitioner." (Docket #22.) Respondent moves  
26 for a stay of the court's order pending appeal, or in the  
27 alternative, for a temporary stay to give respondent the  
28 opportunity to seek a stay in the Ninth Circuit.

1       Federal Rule of Appellate Procedure 8(a) provides that a  
2 party must move in the district court for a stay of the judgment  
3 or order of a district court pending appeal. In the context of a  
4 habeas corpus matter, "Federal Rule of Appellate Procedure 23(c)  
5 provides that, when the Government appeals a decision granting a  
6 writ of habeas corpus, the habeas petitioner shall be released  
7 from custody," unless the court rendering the decision orders  
8 otherwise. Hilton v. Braunskill, 481 U.S. 770, 772 (1987).<sup>1</sup> Rule  
9 23(c) "undoubtedly creates a presumption of release from custody  
10 in such cases," but the presumption may be overcome where the  
11 factors traditionally considered in deciding whether to stay a  
12 judgment in a civil case, "tip the balance against it." Id. at  
13 774, 777. These factors include: "(1) whether the stay applicant  
14 has made a strong showing that he is likely to succeed on the  
15 merits [of its appeal]; (2) whether the applicant will be  
16 irreparably injured absent a stay; (3) whether the issuance of  
17 the stay will substantially injure the other parties interested  
18 in the proceeding; and (4) where the public interest lies." Id.  
19 at 776-77. "Where the State establishes that it has a strong  
20 likelihood of success on appeal, or where, failing that, it can  
21 nonetheless demonstrate a substantial case on the merits,  
22 continued custody is permissible if the second and fourth factors  
23 . . . militate against release." Id. at 778. Where the merits  
24 showing does not meet this level, "the preference for release

1 Fed. R. App. Proc. 23(c) provides: "While a decision  
26 ordering the release of a prisoner is under review, the prisoner  
27 must - unless the court or judge rendering the decision, or the  
28 court of appeals, or the Supreme Court, or a judge or justice of  
either court orders otherwise - be released on personal  
recognition, with or without surety."

1 should control." Id. Ultimately, like its discretion in  
2 "conditioning a judgment granting habeas relief," this court has  
3 "broad discretion" in determining "whether the judgment granting  
4 habeas relief should be stayed pending appeal." Id. at 775.

5 In this case, respondent has shown a possibility, although  
6 not a likelihood, of success on some of the substantial issues  
7 presented in this case. These issues include, *inter alia*: (1)  
8 whether there is clearly established federal law requiring that a  
9 decision to deny parole be supported by "some evidence"; (2) if  
10 such law exists, whether some evidence existed in this case; (3)  
11 whether clearly established federal law precludes the state from  
12 relying on petitioner's crime to find him unsuitable for parole;  
13 and (4) whether the appropriate remedy for a violation was  
14 release without allowing the Board or the Governor an opportunity  
15 to review the decision. All of these matters present complicated  
16 questions, which neither the Supreme Court nor the Ninth Circuit  
17 have definitively addressed.<sup>2</sup>

18 However, apart from the complexity of the merits issues, the  
19 other factors do not militate strongly in favor of a stay.  
20 Respondent has not made a particularized showing that  
21 petitioner's release would endanger public safety or otherwise  
22 harm the parole system generally. Indeed, should the appellate  
23 court reverse this court's grant of the petition, petitioner, if  
24 released, could simply be ordered back to prison. Presumably, as  
25 again, respondent has made no showing of a flight risk,

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27 <sup>2</sup> These questions and the relevant case law are  
28 thoroughly described by the magistrate judge in the F&Rs, by  
respondent's brief objecting to the F&Rs, and the instant motion.  
Accordingly, the court does repeat that discussion here.

1 petitioner would return as directed; a surety, pursuant to Rule  
2 23(c), could also be ordered to assure his return. The court  
3 also rejects respondent's contention that a stay, which  
4 necessarily prolongs detention, will not injure petitioner as  
5 well as respondent's argument that a stay sufficiently furthers  
6 the public interest in respecting the state's parole process to  
7 overcome the presumption of release.

8 Nevertheless, the court finds that consideration of all  
9 relevant factors, including the highly difficult questions on the  
10 merits, warrants a limited stay to allow respondent to seek a  
11 stay from the Ninth Circuit Court of Appeals pursuant to Federal  
12 Rule of Appellate Procedure 8(a)(2)(A)(ii).

13 IT IS SO ORDERED.

14 DATED: February 11, 2010



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16 FRANK C. DAMRELL, JR.  
17 UNITED STATES DISTRICT JUDGE  
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